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Testimony Concerning Sentencing Reform Proposals

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The essential task of reforming our criminal sentencing practices in Massachusetts is at a crossroad. In its seminal 1991 report, the Boston Bar Association (BBA) Task Force on Justice called for reform of “a system which is both too lenient and too harsh.” The “too lenient” reference was to the existence of unlimited and unreviewable judicial sentencing discretion, and the availability of “indefinite” sentences to Concord or Framingham state prisons which permitted parole release upon completion of a small fraction of the sentence imposed. The “indefinite” state prison sentences, of course, were quickly abolished, and are now long gone.

The “too harsh” aspect of the Task Force report focused on two realities: the overreliance on incarceration, and the unfairness of mandatory sentencing. As to incarceration, the Report criticized the rapid growth in the number of people incarcerated, and the runaway expense of imprisoning ever greater numbers of people during the decade preceding the BBA’s 1991 report. Since 1980, the Report disclosed, the number of persons incarcerated in Massachusetts had more than doubled, rising from under 6,000 to approximately 15,000; and it pointed out that Department of Correction spending had grown by almost 300% during that period. Prophetically, the Report noted that “the end is not in sight.”

In fact, the Massachusetts imprisoned population has continued to grow and grow: from 15,326 in January, 1991, to 21,988 as of May 12, 2003--a further increase of 6,662 prisoners.¹ In other words, the increase in our imprisoned population since 1991 exceeds the total number of persons who were incarcerated in 1980! During the same period, annual corrections spending has more than doubled once again, from \$385 million in FY91 to \$824 million in FY03; a staggering increase of \$439 million.

The Task Force called in no uncertain terms for the repeal of mandatory sentencing, particularly the harsh and ineffective mandatory drug sentencing laws; and for the establishment of a “tough, effective, and cost efficient” system of intermediate sanctions in lieu of incarceration for non-violent offenders. With the enactment of Chapter 211E (Sentencing Commission) and 211F (Office of Community Corrections) in 1996, the Legislature took two significant steps to accomplish those goals. Chapter 211E requires the Commission to “prevent the prison population in the commonwealth from exceeding the capacity of the prisons,” and to “encourage the development and implementation of intermediate sanctions in appropriate cases” G.L. c.211E, §2 (6) (C), (7). It authorizes the establishment of sentencing guidelines which

¹ There was an overall decrease of 1,500 prisoners from January, 1999, to January, 2003. However, this decline appears to have been only temporary. During calendar year 2002, there was a disturbing 10% increase in State Prison commitments; and from January to May 12, 2003, the combined state prison and county house of correction population increased by 340 inmates. Source: Massachusetts Sentencing Commission.

include “non-exclusive aggravating and mitigating circumstances,” §3(d), and which permit sentencing judges to “depart from the range established by the sentencing guidelines and impose a sentence below any mandatory minimum term prescribed by statute,” in cases other than murder. Above all, Chapter 211E sought to rein in runaway correctional spending, and preserve the public safety more intelligently and at more justifiable cost, by utilizing the expertise of the Sentencing Commission’s highly regarded professional staff, and its broad-based membership.

The Committee for Public Counsel Services (CPCS) has long articulated several serious reservations about the Sentencing Commission’s proposed legislation, and we have put forth specific corrections which would satisfactorily address those concerns. We reiterate those reservations and correctives today. Please see the attached **“CPCS Concerns Re: Sentencing Commission Recommendations,”** which is identical to the document we submitted to this Committee at its last hearing concerning this issue on May 10, 2001. We nevertheless recognize and appreciate the objectivity and care with which the Commission has discharged its duties under the statute, and the excellence with which its staff has carried out its research and reporting responsibilities.

CPCS urges that any bill which is ratified by this Committee must accomplish two vital objectives:

1. Restore a meaningful measure of judicial discretion to drug offense sentencing. So-called “mandatory” sentencing--which is not at all “mandatory” as to police and prosecutorial practices--has proven to be a public policy nightmare: ineffective at preserving the public safety, and recklessly wasteful as fiscal policy. At present, Massachusetts is warehousing approximately 2,000 inmates, most of them in State Prison, under minimum mandatory drug sentences. Moreover, mandatory drug sentencing is racially discriminatory in its effect. According to data collected from the courts by the Sentencing Commission, fully 80% of criminal defendants who receive mandatory minimum drug sentences are members of racial minorities, compared to 34% of those convicted of all other crimes.
2. Reverse the two-decades long over-emphasis upon incarceration as the primary response to crime. We are now incarcerating four times as many people, at almost eight times the annual cost, as we did in 1980. To alter the Sentencing Commission’s proposal in the direction of increased harshness, as the House of Representatives did in 2001, would be to drive a very large fiscal dagger into the Commonwealth’s effort to survive the current fiscal crisis. According to Sentencing Commission projections, passage of the bill which received House approval in 2001 would add three thousand, two hundred and thirty-nine (3,239) prisoners--most of them state prisoners--after eight years. To build the cells to house these prisoners would require a capital investment of at least three hundred and twenty-four million dollars.² Moreover, to

² The additional cells would certainly be needed. In the last quarter of 2002, the DOC was operating at 133% of its design capacity; and the Houses of Correction at 149%. DOC Quarterly Report on the Status of Prison Overcrowding (January, 2003).

operate such an enlarged correctional system would add anywhere from \$116 million³ to \$142 million⁴ annually to the already inflated cost of operating this bulging corrections system.

Sentencing policy in Massachusetts is at an historic crossroad. Your decision will impact not just sentencing policy, but will reverberate across every aspect of the Commonwealth's budget, as our government struggles to provide essential services in a time of acute economic challenge.

³ Using the Sentencing Commission's estimate of \$36,000 per prisoner (versus \$4,000 for intermediate sanctions under the Office of Community Corrections).

⁴ Using the Massachusetts Budget and Policy Center's estimate of \$44,000 per prisoner, as reported in *The Boston Globe*, May 18, 2003, at page H12.